

# The Art of Trial Advocacy

Faculty, The Judge Advocate General's School, U.S. Army

## The Government Appeal “We Disagree, Your Honor!”

### Introduction

You are the trial counsel in a contested general court-martial. The accused is charged with two specifications of drug distribution and one specification of drug use. Unfortunately, the government’s case rests almost entirely on one witness, a less than truthful soldier who will testify that the accused sold him cocaine on two different occasions. The witness will also testify that on one of those occasions, the accused ingested cocaine in his presence. The only other evidence of drug use is the accused’s positive urinalysis test result. The defense moved to suppress the urinalysis, arguing that the sample was illegally seized in violation of the accused’s Fourth Amendment rights. The defense counsel just finished a convincing legal argument, albeit in your mind incorrect, and requested that the military judge suppress the positive urinalysis. You tried to explain to Judge Hardhead why the defense argument is wrong, but to no avail. Judge Hardhead now begins to state for the record his essential findings, and you see the writing on the wall—the urinalysis is going to be suppressed! As much as the judge’s decision is troubling, you realize that his mind is made up, and there is nothing you can do to change it.

So now what? You have doubts about proving your case based entirely on the testimony of one witness, especially when that witness carries with him much fodder for cross-examination. While pondering your predicament, you are jolted back from your thoughts by Judge Hardhead’s third and much louder repetition of “Counsel, are you ready to proceed?” Suddenly, an idea hits you: a government appeal! But what do you do next? How do you start one? What will the judge do? A closer look at the government appeal process will help answer these questions.

## What Qualifies for a Government Appeal

The first step in understanding government appeals is to know what will qualify for an appeal. Not all rulings or orders by the military judge can be appealed. The applicable law addressing government appeals is Article 62, Uniform Code of Military Justice (UCMJ).<sup>1</sup> Article 62 specifically authorizes the President to prescribe regulations governing appeals by the United States.<sup>2</sup> Rule for Courts-Martial (RCM) 908 provides the general rules and specific procedural requirements for processing government appeals.<sup>3</sup> Rule for Courts-Martial 908(a) requires two conditions for a government appeal, a qualifying proceeding and a qualifying ruling.<sup>4</sup>

The first condition, a qualifying proceeding, requires that the appeal comes from a “trial by a court-martial over which a military judge presides and in which a punitive discharge may be adjudged.”<sup>5</sup> In other words, the proceeding must be a general court-martial (GCM) or a special court-martial (SPCM) authorized to adjudge a bad conduct discharge (BCD). In the hypothetical, you are at a GCM; therefore, the first condition for appeal is met.

The second condition, a qualifying ruling, is that the appealed order or ruling is one of four types: (1) an order or ruling that “terminates the proceedings with respect to a charge or specification”;<sup>6</sup> (2) an order or ruling that “excludes evidence that is substantial proof of a fact material in the proceedings”; (3) an order or ruling that “directs the disclosure of classified information”; or (4) an order or ruling that “imposes sanctions for nondisclosure of classified information.”<sup>7</sup> The urinalysis test result qualifies as “substantial proof of a material fact.”<sup>8</sup> Accordingly, suppression of the urinalysis test in the hypothetical would qualify as a ruling that the government could appeal.

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1. UCMJ art. 62 (2000).

2. *Id.* art. 62(b).

3. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 908 (2000) [hereinafter MCM]. The President prescribed Rule for Courts-Martial 908 based upon Article 62. *See id.*

4. *Id.* R.C.M. 908(a).

5. *Id.*

6. An appellate court may also consider an appeal of an order or ruling that is the “functional equivalent” of a ruling that terminates the proceedings. *See, e.g., United States v. True*, 28 M.J. 1 (C.M.A. 1989) (holding that a military judge’s abatement order was the functional equivalent of a ruling that terminates the proceedings).

## Procedure for the Trial Counsel

After determining that the military judge's ruling qualifies for a government appeal, the next step requires an understanding of the procedure. The first and most important thing to remember is that the rule provides the trial counsel, upon request, with seventy-two hours to determine whether to file an appeal. The request halts the proceedings "except [for] matters unaffected by the ruling or order."<sup>9</sup> The trial counsel can use this time to figure out the rest of the procedure for a government appeal, and to seek the wisdom of the chief of justice and the staff judge advocate (SJA) before proceeding further.<sup>10</sup>

If the government decides to appeal, the trial counsel must file a "notice of appeal" with the military judge within the 72-hour delay period.<sup>11</sup> The trial counsel must have authorization from the GCM authority or SJA to file the notice of appeal.<sup>12</sup> The notice must identify the ruling or order appealed and the charges and specifications affected. The trial counsel must certify that the appeal is not "for the purpose of delay and (if the ruling appealed is one which excludes evidence) that the

excluded evidence is substantial proof of a [material fact]."<sup>13</sup> The certificate must also reflect the date and time of the military judge's ruling, and the date and time the certificate was served on the military judge.<sup>14</sup> Service of the notice of appeal on the military judge imposes an automatic stay of the ruling or order.<sup>15</sup>

The Chief, Government Appellate Division (GAD), ultimately decides whether to file the appeal with the appellate court.<sup>16</sup> The trial counsel's job is to forward the appeal "promptly and by expeditious means."<sup>17</sup> *Army Regulation 27-10* requires the trial counsel to forward the appeal within twenty days of service of the notice of appeal on the military judge.<sup>18</sup> The appeal must include a statement of the issues appealed,<sup>19</sup> the certificate of notice of appeal, and four copies of the record of trial.<sup>20</sup> This requires preparation and authentication of a verbatim record of trial. The record of trial should cover only those proceedings that relate to the issue being appealed. The military judge or appellate court, however, may direct inclusion of additional portions of the proceedings.<sup>21</sup>

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7. MCM, *supra* note 3, R.C.M. 908. The rule also adds two additional grounds for appeal that are closely related to the fourth type: "The United States may also appeal a refusal by the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information or to enforce such an order that has previously been issued by the appropriate authority." *Id.* The rule specifically provides, however, "that the government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification." *Id.* A charge or specification dismissed on multiplicity grounds, therefore, qualifies as an appealable ruling, whereas a military judge's decision to grant a defense motion for a finding of not guilty pursuant to RCM 917 does not. *See, e.g.,* United States v. Weymouth, 43 M.J. 329 (1995); United States v. Adams, 52 M.J. 836 (A.F. Ct. Crim. App. 2000).

8. The question of whether the excluded evidence is "substantial," is determined by the petitioner. *See, e.g.,* United States v. Scholz, 19 M.J. 837 (N.M.C.M.R. 1984). It is not necessary for the suppressed urinalysis result to be the only government evidence in the case. *See, e.g.,* United States v. Pacheco, 36 M.J. 530 (A.F.C.M.R. 1992).

9. MCM, *supra* note 3, R.C.M. 908(b)(1).

10. The Trial Counsel Assistance Program (TCAP) should also be contacted since TCAP serves as the liaison between the chief of justice and the Government Appellate Division (GAD) on government appeals. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE para. 22-2 (20 Aug. 1999) [hereinafter AR 27-10].

11. MCM, *supra* note 3, R.C.M. 908(b)(2).

12. AR 27-10, *supra* note 10, para. 13-3(a). Trial counsel should check local supplements of AR 27-10 for additional information.

13. MCM, *supra* note 3, R.C.M. 908(b)(3).

14. AR 27-10, *supra* note 10, para. 13-3(b).

15. MCM, *supra* note 3, R.C.M. 908(b)(4). Just as the seventy-two-hour delay is only for matters affected by the ruling or order, the automatic stay does not prevent litigation of motions concerning charges and specifications not affected by the ruling or order. If the trial on the merits has not yet begun, a severance *may* be granted as to the unaffected charges and specifications. If the trial on the merits has begun, the military judge may allow presentation of further evidence on the unaffected charges and specifications. *Id.*

16. AR 27-10, *supra* note 10, para. 13-3(a). The Chief, GAD, makes the decision after coordination with the Assistant Judge Advocate General for Military Law and Operations. *Id.* The TCAP serves as the liaison between the field and the GAD concerning potential appeals under Article 62. *Id.* para. 22-2.

17. MCM, *supra* note 3, R.C.M. 908(b)(6).

18. AR 27-10, *supra* note 10, para. 13-3(c). The twenty-day deadline of AR 27-10 includes submission of the record of trial. *Id.* Although the regulation allows for twenty days, the drafters of the rule state that "ordinarily the matters specified should be forwarded within one working day." According to the drafters, "the record need not be forwarded at this point as that might delay disposition." MCM, *supra* note 3, R.C.M. 908 analysis, app. 21, at A21-55. To meet the one-day requirement, trial counsel can forward a summary record for preliminary consideration. *Id.*

19. MCM, *supra* note 3, R.C.M. 908(b)(6).

20. AR 27-10, *supra* note 10, para. 13-3(c). The four copies of the verbatim record of trial include an original and three copies. *Id.*

## What Happens Next: The Appellate Proceedings

Once you ship the necessary materials to GAD, you have completed your expected portion of the appeal, for now. If the Chief, GAD, decides to file the appeal with the Army Court of Criminal Appeals (ACCA), the original record of trial is promptly filed with the court and a copy forwarded to the appellate defense counsel.<sup>22</sup> It may be some time before the ACCA resolves the issue. The ACCA Rules allow GAD at least twenty days from the date the record of trial is filed with the ACCA to file the appeal and supporting brief.<sup>23</sup> The rules then provide appellate defense counsel twenty days to file a response.<sup>24</sup> Article 62 and RCM 908 state that government appeals “shall, whenever practicable, have priority over all other proceedings before [the court].”<sup>25</sup> Because of the generous filing timeline, however, it may be two months or more from your 72-hour delay request until the ACCA decides the appeal.<sup>26</sup>

Once the ACCA decides the issue, the Clerk of Court will notify the military judge and the convening authority.<sup>27</sup> Either party can request that the Court of Appeals for the Armed Forces (CAAF) review the ACCA decision; the accused has sixty days from notification of the ACCA decision to make such request. The court-martial can now proceed with the affected charges and specifications, unless the proceedings are further stayed by the ACCA decision or by the CAAF.<sup>28</sup>

## Finishing Up: The Remainder of Trial Counsel Duties

The accused will normally be notified of the ACCA decision orally on the record by the military judge.<sup>29</sup> This notification can also be made in accordance with RCM 1203(d).<sup>30</sup> Either method requires the trial counsel to prepare a certificate of notification. The certificate must include the fact that the accused was notified, the method of notification used, and the date notification was made.<sup>31</sup> The trial counsel must immediately send the certificate to the ACCA Clerk of Court.<sup>32</sup> If the decision is adverse to the accused and “the accused is notified orally on the record,” RCM 908(c)(3) also requires the trial counsel to forward the certificate to The Judge Advocate General.<sup>33</sup>

## Conclusion

Government appeals are not that common. The hypothetical at the outset is certainly more common than appeals filed with the ACCA under Article 62. It is important, however, that counsel are aware of the availability of such an option and that they understand the procedure involved. Returning to the hypothetical, Judge Hardhead asks the question, “Counsel, are you ready to proceed?” You now respond: “We disagree, your honor! The government requests a seventy-two-hour delay pursuant to Rule for Courts-Martial 908(b)(1) to determine whether to appeal your ruling.” Major Harder.

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21. MCM, *supra* note 3, R.C.M. 908(b)(5).

22. U.S. DEP'T OF ARMY, REG. 27-13, MILITARY JUSTICE: COURTS OF MILITARY REVIEW RULES OF PRACTICE AND PROCEDURE, R. 21.1(a) (29 May 1986) [hereinafter ACCA Rules]. The Defense Appellate Division (DAD) will represent the accused. *See* MCM, *supra* note 3, R.C.M. 1202.

23. ACCA Rules, *supra* note 22, R. 21(d)(1).

24. *Id.* R. 21(d)(2).

25. UCMJ art. 62(b) (2000); MCM, *supra* note 3, R.C.M. 908(c)(2).

26. Any delay resulting from a government appeal is excluded from speedy trial issues, unless the appeal is “filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.” UCMJ art. 62(c).

27. AR 27-10, *supra* note 10, para. 13-3(d).

28. MCM, *supra* note 3, R.C.M. 908(c)(3).

29. *See id.*

30. *See* MCM, *supra* note 3, R.C.M. 1203(d). Rule for Courts-Martial 1203(d) provides the rules for notification to the accused of decisions of a Court of Criminal Appeals on direct review. *See id.*

31. AR 27-10, *supra* note 10, para. 13-3(d).

32. *Id.*

33. MCM, *supra* note 3, R.C.M. 908(c)(3).